SUPREME COURT, U. S.
JUL 26 1967
JOHN F. DAVIS, CLERK

No. 421

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, PETITIONER HEREIN (and respondent in the court below) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above cause on April 7, 1967 which adjudged that a writ of mandamus issue directing petitioner to transfer a certain cause based on the Federal Employer's Liability Act to the United States District Court for the Eastern District of Tennessee, Northern Division for trial.

OPINIONS BELOW

There was no written opinion in either the United States Court of Appeals for the Seventh Circuit or the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 7, 1967 and is reprinted in Appendix A hereto, page 1a. A timely petition for rehearing was denied on April 28, 1967 (R. 89). The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the judgment of the Court of Appeals, based on a *de novo* determination of the Railroad's motion to transfer under 28 U.S.C. § 1404(a), conflict with *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964)?

2. Is the use of the extraordinary writ of mandamus a proper method to review a non-appealable order denying a § 1404(a) motion to transfer—an issue the Court expressly left undecided in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 33 (1955) and *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244 (1964)?

3. Assuming that mandamus writ may be used to review a § 1404(a) motion and that a reviewing court may make a *de novo* determination of that motion, did the Court of Appeals in this instance properly issue a writ to require petitioner to grant the Railroad's motion?

STATUTES INVOLVED

The statutes involved are:

(1) 76A Stat. 699, 28 U.S.C. §1404(a):

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

(2) 63 Stat. 102, 28 U.S.C. § 1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law".

(3) 53 Stat. 1404, 45 U.S.C. § 51 states in part:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

(4) 62 Stat. 989, 45 U.S.C. § 56:

> "Under this chapter an action may be brought in a district court of the United States, in the district * * * in which the defendant shall be doing business at the time of commencing such action."

A STATEMENT OF THE CASE

The Original F.E.L.A. Action

Ralph Underwood initiated an action in the United States District Court for the Northern District of Illinois, Eastern Division, against his employer, the Southern Railway Company, respondent herein (hereafter "the Railroad"), to recover damages under the Federal Employer's Liability Act (45 U.S.C. §§ 51 et seq.) for injuries suffered while in the employ of the Railroad. The case was assigned for trial to petitioner, the Chief Judge of the court (R. 6).

The Railroad's Motion To Transfer

The Railroad then moved pursuant to 76A Stat. 699, 28 U.S.C. § 1404(a), to transfer the cause to the Eastern District of Tennessee, Northern Division "for the convenience of the parties and the witnesses and in the interests of justice * * * (R. 9).

The Railroad attached various affidavits and materials to its motion wherein it asserted that Underwood's residence was in Knoxville, Tennessee, that he had been injured and treated there, that key witnesses resided there, that the Railroad would suffer undue burden to defend in a trial in Chicago, and that earlier state court actions filed by Underwood against the Railroad for the same claim in areas outside of Knoxville had been dismissed for *forum non conveniens* (R. 6-22).

In reply, Underwood asserted that the Railroad would suffer no unfairness if the case was tried in Chicago; that the few witnesses involved, especially since almost all of them were employed by the Railroad or closely associated with it, could easily and economically come to Chicago for the trial or give their depositions to be used at the trial. (R. 23-48)

Order Of Petitioner

After considering all of these materials as well as briefs filed by Underwood and the Railroad, petitioner denied the Railroad's motion on November 2, 1966 in an order (Appendix B hereto, p. 3a) which stated in part:

> "• • • in light of the criteria tests set forth in § 1404(a) (Title 28 U.S.C.A.)—i.e. convenience of the parties and witnesses and most importantly the interest of justice—the court finds that there has not been a sufficient showing that '. . . the balance is strongly in favor of the defendant . . .' so as to avoid plaintiff's choice of forum."

The Railroad's Petition For A Writ Of Mandamus

The Railroad then filed in the United States Court of Appeals for the Seventh Circuit a petition for a writ of mandamus (R. 1) in which it set forth all of the matters discussed above and prayed that the court issue a writ of mandamus directing petitioner to vacate his November 2, 1966 order which denied its § 1404(a) motion and ordering him to transfer the cause to the Eastern District of Tennessee, Northern Division for trial. The Railroad claimed that petitioner's denial of the § 1404(a) motion "was clearly erroneous and amounted to an abuse of discretion, • • •" (R. 4).

The Court of Appeals issued a rule on petitioner to show cause why the writ should not issue and petitioner then filed his answer (54, 79).

Judgment of Court of Appeals

On April 7, 1967 two judges of the Court of Appeals (Judges Swygert and Cummings) voted to grant the Railroad's petition for a writ of mandamus (Appendix A, p. 1a). Judge Knoch voted to deny the petition. There was no written opinion by any of the judges.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' JUDGMENT, BASED ON A DE NOVO DETERMINATION OF THE RAILROAD'S § 1404(a) MOTION, IS IN DIRECT CONFLICT WITH PLATT v. MINNESOTA MINING & MANUFACTURING CO., 376 U.S. 240, 245 (1964).

The sole ground urged by the Railroad in support of its mandamus petition was that petitioner was guilty of "an abuse of discretion" in denying its § 1404(a) motion (R. 4).

The Railroad did not and obviously could not argue that petitioner considered any improper criteria in denying its motion since petitioner's denial order stated that it was based on the "convenience of the parties and witnesses and most importantly the interest of justice * * *", appropriate criteria to be considered for resolution of a § 1404(a) motion.

Thus, the Railroad in support of its mandamus petition was required to urge upon the Court of Appeals the very same arguments it presented to petitioner in support of its original § 1404(a) motion—the convenience of the parties and witnesses, etc. In other words, the Railroad requested the Court of Appeals to make a *de novo* determination of its § 1404(a) motion.

As a consequence, while the two judges of the Court of Appeals who voted to issue the writ of mandamus wrote no opinion in support of their decision, it is apparent that by necessity they made a *de novo* determination of the Railroad's § 1404(a) motion.

This *de novo* determination exceeded the Court of Appeals' appellate jurisdiction in mandamus actions involv-

ing § 1404(a) motions and directly conflicts with the rule the Court enunciated in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964).[1] There District Judge Platt has denied defendant's motion to transfer the case to another district. Defendant then petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus to reverse Judge Platt's order. The Court ruled that Judge Platt had considered improper criteria in denying the motion. Instead of remanding the cause for further consideration by Judge Platt, the court issued a mandamus writ directing him to transfer the case to another district.

This Court then unanimously vacated the Seventh Circuit's mandamus writ and directed that the cause be remanded to Judge Platt for reconsideration of the transfer motion in light of appropriate criteria only. In its opinion, the Court emphasized that a reviewing court's sole function in a case of this nature is to determine if the trial judge considered appropriate criteria in resolving the transfer motion. If the reviewing court finds that the trial judge has considered only appropriate criteria, the reviewing court's function ends. It should not then make a *de novo* determination of the motion (376 U.S. at 245):

> "The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand. Extraordinary writs are 'reserved for really extraordinary causes.' *Ex parte Fahey*, 332 U.S. 258, 260 (1947), and then only 'to confine an inferior court to

[1] While *Platt* involved analogous Rule 21(b) of the Federal Rules of Criminal Procedure, it is apparent that the pertinent remarks of the Court apply with equal weight to § 1404(a) motions. See *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445-48 (2d Cir. 1966) (concurring opinion by Judge Friendly).

a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used 'to actually control the decision of the trial court.' *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953)."

Mr. Justice Harlan in a concurring opinion restated this rule and said that the "outright reversal" of Judge Platt's order "cannot well be regarded as other than a *de novo* determination of the change of venue motion on the part of the Court of Appeals. Such a course inescapably contravenes accepted principles governing the exercise of appellate jurisdiction". (376 U.S. at 246)[2]

Petitioner respectfully submits that this direct conflict between the Seventh Circuit's judgment and the rule of this Court in the *Platt* case warrants that the instant petition for writ of certiorari be granted.

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[2] On remand Judge Platt again denied the transfer motion. The Court of Appeals in a second appeal (345 F. 2d 681) issued another writ directing Judge Platt to transfer the case. In dissent, Chief Judge Hastings urged that the court had in fact made a *de novo* determination in violation of the Supreme Court's admonition (345 F. 2d at 688). A petition for writ of certiorari was then filed on behalf of Judge Platt, seeking reversal for the reasons stated in Judge Hastings' dissent. However, Judge Platt died and the case became moot for this and other reasons. The Supreme Court granted the petition and summarily *vacated* the mandamus writ by agreement of the parties (382 U.S. 456). As a consequence, the Court did not review the validity of the second writ.

II.

THE NUMEROUS DECISIONAL CONFLICTS AMONG AND WITHIN THE CIRCUIT COURTS OF APPEALS REQUIRE THAT THE SUPREME COURT DETERMINE IF THE USE OF THE EXTRAORDINARY WRIT OF MANDAMUS IS A PROPER METHOD TO REVIEW § 1404(a) MOTIONS—AN ISSUE THE COURT EXPRESSLY LEFT UNDECIDED IN NORWOOD v. KIRKPATRICK, 349 U.S. 29, 33 (1955) AND PLATT v. MINNESOTA MINING & MANUFACTURING CO., 376 U.S. 240, 244 (1964.)

Since an order denying a Section 1404(a) motion is not final, it is not appealable. The use of mandamus procedure to circumvent this established principle has been the subject of increasing controversy among the Circuit Courts of Appeal since the enactment of § 1404(a) in 1948.

As early as 1952, Judge Goodrich in the leading case of *All States Freight, Inc.* v. *Modarelli,* 196 F. 2d 1010, 1012, (3rd Cir. 1952), refused to permit a mandamus writ to be used to obtain review of § 1404(a) orders where, as in the instant case, the order was based on appropriate criteria:

> "• • • the risk of a party being injured by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus."
>
> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon."

The views of Judge Goodrich have been adopted by the First, Fourth and District of Columbia Circuits, and for

a substantial period of time, the Eight Circuit.[3] Other circuits, notably the Seventh and the Second, have permitted review of Section 1404(a) orders through mandamus procedure in certain instances.[4]

Ten years ago this conflict was described by Professor Charles Alan Wright as a "controversy which now rages as to the use of mandamus to review trial orders granting or denying a transfer * * *. The views of the circuits are utterly conflicting * * *" (Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 776).

The issue of the propriety of mandamus procedure to review Section 1404(a) orders was before the Court in the cases of *Norwood* v. *Kirkpatrick*, 349, U.S. 29, 33, *Van Dusen* v. *Barrack*, 376 U.S. 612, 615 (1964) (note 3), and *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244 (1964). However, in each instance the Court left the question open for future resolution.

The controversy on this issue among the circuits has not diminished either in intensity or in frequency since the Court's decisions in *Norwood*, *Van Dusen* and *Platt*. On the contrary, the controversy has increased. The entire matter is reviewed at length in the majority and concurring opinions in the very recent decision of *A. Olinick & Sons* v. *Dempster*, 365 F. 2d 439 (2d Cir. 1966).

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[3] *In re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Clayton* v. *Warlick*, 232 F. 2d 699 (4th Cir. 1956); *Great Northern Ry.* v. *Hide*, 238 F. 2d 852 (8th Cir. 1956); *Loew's Inc.* v. *McGuire*, 205 F. 2d 719 (D.C. App. 1953).

[4] *Chicago, Rock Island & P.R. Co.* v. *Igoe*, 220 F. 2d 299 (7th Cir. 1955) and *A. Olinick & Sons* v. *Dempster*, 365 F. 2d 439 (2d Cir. 1966).

The controversy in fact has extended to various judges *within* the same circuit. For example, Judge Hastings,[5] Castle and apparently Knoch (who voted to deny the writ in the instant case) of the Seventh Circuit, believe that mandamus procedure should not be employed to review § 1404 (a) orders where the order is based on appropriate criteria. Judge Friendly in the Second Circuit acknowledged that his position on this issue differs from that of his brethren.[6]

Even among the circuits which permit review of § 1404 (a) orders by mandamus writ, there is a disparity of the standards to be applied.[7]

This controversy is not one which will decrease with the passage of time. The increasing number of cases which involve multiple parties in different parts of the country has caused more § 1404(a) motions to be filed.

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[5] See Chief Judge Hastings' dissent in both of the Seventh Circuit decisions in *Minnesota Mining & Manufacturing Co.* v. *Platt*, 314 F. 2d 369, 378 (7th Cir. 1963) and 345 F. 2d 681, 688-9, (7th Cir. 1965). In this latter decision, Chief Judge Hasting echoed the earlier warnings of the late Judge Finnegan in his lengthy dissent in *Chicago, Rock Island & P. R. Co.* v. *Igoe*, 220 F. 2d 299, 305 (7th Cir. 1955).

[6] See Judge Friendly's concurring opinion in *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445 (2d Cir. 1966).

[7] For example, mandamus writ may be issued where there is "an abuse of discretion", "a clear abuse of discretion", where the trial court's action was "arbitrary" or "clearly erroneous" or where there exist "extraordinary circumstances". The decisions in which these views of certain circuits are reflected are cited in *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445-6 (2d Cir. 1966). This same decision also notes another conflict in the circuits which has been created by certain litigants seeking review of § 1404(a) orders by way of interlocutory appeal under 72 Stat. 348, 28 U.S.C. § 1292(b). See 365 F. 2d at 442-3.

It is vital that the Court resolve this controversy and determine the propriety of mandamus procedure to review § 1404(a) orders in order that all federal judges, including petitioner, may have appropriate guidelines to follow in passing upon this important question.

It is respectfully submitted that for the reasons stated by Judge Goodrich in *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010, 1012 (3d Cir. 1952) (discussed above) the writ of mandamus should not have been issued in the instant case.

CONCLUSION

This case represents one of the very few occasions where a Court of Appeals in a Federal Employer's Liability Act action by mandamus writ has ordered a trial judge to transfer the action to another district.[8] The case raises important questions of policy involving § 1404(a) and F.E.L.A. actions.

For all of the reasons stated above, petitioner prays that his petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Compare *Ex parte Gulf, Colo & S.F.R. Co.*, 308 F. 2d 803 (5th Cir. 1962) where the court in an F.E.L.A. action involving similar facts refused to grant a writ to vacate an order denying a § 1404(a) motion.